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**82-1584**

No.

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1982

UNITED STATES OF AMERICA

*v.*

GEORGE SCHELL,

*Petitioner*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Is Petitioner denied due process, a fair trial and an opportunity to present a defense in a trial founded upon a Government orchestrated proactive investigation where the district court prohibits the introduction of unused and intact tangible evidence which by the Government's theory of prosecution should not even exist; limits defense expert testimony; inhibits the Petitioner's right to testify; and fails to comply with minimal standards for establishing the competency of Government videotape evidence.

2. Whether the delay in trial of the Petitioner violated the Mandate of the Speedy Trial Act of 1974 to his prejudice.

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No.

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UNITED STATES OF AMERICA

*v.*

GEORGE SCHELL

*Petitioner,*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court:

Petitioner, by his counsel, Theodore Simon, petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Third Circuit in this case.

## OPINION BELOW

In the United States District Court, although no opinion was filed, a Motion for Judgment of Acquittal was denied, and the Court imposed a judgment of sentence from which direct appeal was taken to the Court of Appeals.

The Judgment Order of the Court of Appeals was issued on January 7, 1983 and is as yet unreported.

## JURISDICTION

A Judgment of sentence was imposed by the United States District Court from which direct appeal was taken to the Court of Appeals. Judgment of the Court of Appeals was entered without opinion, on January 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 Paragraph 1.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived or life, liberty, or property, without due process of law."

The Speedy Trial Act, 18 U.S.C. §3161, provides in pertinent part:

"§3161. Time limits and exclusions

(h) The following periods of delay shall be excluded in computing the time within which an information

or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

> (4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.
>
> (8) Any period of delay resulting from a continuance granted by any judge on his own motions or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interest of the public and the defendant in a speedy trial.

## STATEMENT

This case is a prime example of the Government's creation of a quasi-criminal business enterprise to entice individuals into engaging in illegal activity.

Petitioner, GEORGE SCHELL, has been charged and convicted of conspiracy to manufacture phenyl-2-propane (P-2-P) and methamphetimine, both schedule II Controlled Dangerous Substances, and possession,

with the intent to distribute methamphetimine, in violation of 21 U.S.C. §841(a)(1) and §846. He has been sentenced to incarceration of four years on each charge, the sentence to run concurrently.

In December of 1980, Special Agent Joseph Vigna began operation, in an undercover capacity, of the J.B.R. Chemical Company. This company, which was the sole creation of the government, advertized and sold legal chemicals and equipment that could be utilized in the manufacture of both legal and illegal substances.

Unknown to customers, the sales office of the J.B.R. Company was equipped with a hidden videotape machine, which could be activated solely by Agent Vigna whenever *he* suspected a customer of illegal intent in his purchase of chemicals or equipment.[1]

The Government's primary evidence at trial consisted of videotapes of the Petitioner and/or his co-defendant, Samuel Allen, at their meetings with Agent Vigna.

Agent Vigna operated the videotape devices on seven separate occasions at which the Petitioner and/or Samuel Allen were present in the J.B.R. sales office. However, in only three instances was an entire, intact recording of the visit obtained. These were made available to the defense during pre-trial discovery proceedings. On the four other occasions, the videotape machine either failed to operate at all; recorded separate visits on the same portion of tape rendering the images unintelligible; recorded only parts of the meeting; or a tape which seemingly never existed was only "discovered" before trial after the defense questioned the integrity of the tapes.

However, in spite of Agent Vigna's poor record in the operation of the videotape machine and the creation and preservation of the videotapes themselves, the Gov-

1. This investigation was the "brainchild" of Agent Vigna and it was initially opposed by his superiors.

ernment was permitted to introduce at trial any intelligible portion of the videotapes.

The first contact between Petitioner, Allen, and Agent Vigna was on December 3, 1980 when Mr. Allen called the J.B.R. Chemical Company. It concerned Mr. Allen's attempt to purchase Ephedrine Hydrochloride, a non-controlled substance with numerous legal uses. By stipulation, the Government agreed its purchase was not in violation of the law.

A meeting on December 4, 1980, was videotaped in its entirety. This meeting between Agent Vigna and Messrs. Schell and Allen concerned the purchase of ephedrine and of phenylanaline, another legal chemical used as a dilutant. Petitioner and Allen emphasized during the meeting that they had no intention of engaging in illegal activity.

At a second meeting on December 11, 1980, only Agent Vigna and Allen were present. No videotape of this exists because of a mysterious malfunction in the equipment. This meeting is the only time allegedly inculpatory statements were made. According to Agent Vigna's testimony Allen purportedly confessed to the manufacture of P-2-P and described his chemist.

A third meeting on January 9, 1981 between Agent Vigna and Messrs. Schell and Allen was videotaped in its entirety. At that time Petitioner and Allen purchased more ephedrine and ordered other legal chemicals and equipment. Agent Vigna also attempted to induce Messrs. Schell and Allen to purchase other chemicals necessary for the manufacture of controlled dangerous substances. Petitioner and Allen resisted these efforts to have them purchase the "needed" chemicals and indeed *did not* purchase them.

A fourth meeting on January 23, 1981 was only partially videotaped. Also, the Government denied this tape's existence throughout pre-trial discovery proceedings and the tape was not made available to the defense at that time. Again, in spite of further urgings by Agent

Vigna, Petitioner and Allen insisted they were not in production of illegal chemicals and they resisted purchasing necessary ingredients from Vigna to produce same.

A fifth meeting on January 29, 1981 between Vigna, Schell and Allen was videotaped in its entirety. Petitioner and Allen again insisted that they were not producing illegal chemicals and, more importantly, they again resisted Agent Vigna's urgings to purchase chemicals and equipment necessary to do so. While the parties do discuss the purchase of Sodium acetate, a necessary ingredient of P-2-P, none was obtained from Vigna until May 1, 1981 and the purchased chemical was found, intact, in the trunk of Allen's car at the time of his arrest on May 4, 1981.

Two last meetings were held between Agent Vigna and Allen on May 1, and May 4, 1981. The videotapes of these meetings were unintelligible because both meetings were taped on the same portion of videotape. Petitioner was not present at either of these meetings when Allen picked up supplies of ephedrine and sodium acetate.

Besides the inconclusive evidence of the mishandled videotapes, the Government also presented the testimony of William Reich, an alleged co-conspirator.[2] Reich, who was neither indicted nor charged, not only described his alleged association with Petitioner and Allen, but also his separate and distinct manufacturing operation of controlled dangerous substances which included only others. Reich testified that he and Schell entered into an agreement whereby Schell would provide the necessry chemicals for the production of methamphetamine by Reich.

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2. Reich testified only in return for a grant of immunity for his wife, support for a sentence reduction for himself and admission into the witness protection program. He had admitted to a cellmate that he was testifyng falsely only for these reasons. In fact Reich had previously described others *not* Schell as his accomplices.

The thrust of the defense was to reveal the incompetency of the Government's evidence, i.e. the videtapes, and its expert conclusion founded upon such evidence that the Petitioner and Allen were in production of controlled dangerous substances or that they had the expertise, based on their own admission on the tapes, to produce controlled dangerous substances.

Consequently, the first defense witness, was Phillip Livingston, the expert videotape engineer hired by the Government to examine the questionable videotapes. He testified that the defects in the videotapes could not have been caused in the manner described and alleged by Agent Vigna.

Other evidence crucial to the defense was produced but was denied admission by the trial court. This included, most significantly, the testimony of two eminently qualified chemical experts who would have testified that Petitioner and Allen neither had the capacity or expertise to produce the controlled dangerous substances as charged. These conclusions, even though founded on the experts review of the videotapes, testimony and other information in the record, were not permitted to be presented to the jury.

Most significantly, the defense was not permitted to present the very chemicals and equipment obtained from the J.B.R. Chemical Company which *remained unused and intact* until their examination by a defense expert. The trial court would not permit the introduction into evidence of such chemicals and equipment without the testimony of Petitioner and held, *sua sponte*, that should the Petitioner testify, he could be impeached by the Government with his prior record. This action was taken by the court even through the Government itself had not intended to use Mr. Schell's prior record for impeachment purposes.

While trial of this matter was originally set for September 21, 1981, it was delayed, without the consent of Mr. Schell, to November 30, 1981 by the district court's

*sua sponte* directive on September 16, 1981, that Mr. Schell undergo a psychiatric evaluation. Mr. Schell objected to such an evaluation and the delay it would cause. He also made multiple applications to the court, both before and after September 21, 1981, for an immediate trial.

The psychiatric evaluation, once obtained, established without question that Mr. Schell was and had always been mentally competent.

## REASONS FOR GRANTING THE WRIT

I. Petitioner is denied due process, a fair trial and an opportunity to present a defense in a trial founded upon a Government orchestrated proactive investigation where the district court prohibits the introduction of unused and intact tangible evidence which by the Government's theory of prosecution should not even exist; limits defense expert testimony; inhibits the Petitioner's right to testify; and fails to comply with minimal standards for establishing the competency of Government videotape evidence.

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At a time when Government orchestrated pro active investigations are ever increasing, and where they are premised upon the Government's unilateral creation and control of the "evidence" through highly technical means under the sole control of Government agents, the question is squarely presented whether traditional, restrictive and individualistic evidentiary rulings should be eased.

In the context of these types of investigations either the effect of such restrictive rulings must be eased, and/or more definitive guidelines must be announced to safeuard the time honored right of a defendant to a fair

trial, due process and an opportunity to present a defense.

Four factors in this investigation and prosecution mandate such a consideration:

A. The at best gross incompetency demonstrated by the Government agent involved in the creation and preservation of crucial videotape evidence;

B. The trial court's refusal to admit unused tangible evidence which by the Government's own theory of prosecution should not even exist;

C. The trial court's *sua sponte* instruction to the government that if the Petitioner testified on his own behalf he could be impeached by a prior record; and

D. The trial court's refusal to permit defense experts to testify that on the basis of the evidence presented the Petitioner did not have the knowledge or capacity to produce the controlled dangerous substance as charged.

The cumulative effect of these factors, particularly in the context of this case, rendered the trial fundamentally unfair and denied Mr. Schell due process. *Chambers v. Mississippi*, 410 U.S. 284 (1973).

A.

As a precondition to the admission into evidence of videotape evidence, several criteria must normally be met:

> (1) the recording device was capable of taking testimony; (2) the operator was competent; (3) the recording was authentic and correct; (4) no alterations were made; (5) the recordings were properly preserved; (6) the speakers were identified; and (7) the testimony was voluntarily given.

See, for example, United States v. Starks, 515 F2d 112 (3rd Circuit 1975).

The seven meetings between Mr. Schell, his co-defendant and Agent Vigna constitute the primary evidence against the defendants. Yet the majority of the videotapes of these meetings — which were made *seriatem* on several tapes — were either mishandled or lost. Only three meetings were actually videotaped in their entirety without some degree of incompetency interferring with their accuracy.

B.

But the failure of the Government Agent to obtain such results *in the majority* of his attempts to do so not only renders them all suspect in the overall context of this case, but also skews the truth-finding process directed against this episode.

Thus, while herein the Government was permitted to use unusually incomplete evidence, Mr. Schell was denied the opportunity to complete the less than accurate view portrayed in the videotapes with other competent evidence. Particularly, he was not permitted to show that all chemicals and equipment referred to in the tapes remained *intact and unused* at the time of Allen's arrest on May 4, 1981.[3]

Thus an offer of proof was made to establish a legally sufficient chain of custody from the time of the deposit of these items in a storage locker to their subsequent retrieval by independent investigators and delivery to an expert witness. See, *United States v. Johnson*, 637 F2d 1224 (9th Cir. 1980); *United States v. Cyphers*, 553 F2d 1064 (7th Cir. 1977); *United States v. Goichman*, 547 F2d 778 (3rd Cir. 1976). However, the district court held that unless Mr. Schell, himself, testified as to the time period between delivery and retrieval the court would not admit evidence that the items remained intact and unused in their original packaging.

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3. The Government's prosecutorial theory was that these items were *used* in the manufacture of controlled dangerous substances.

This action by the district court prevented the introduction of relevant evidence crucial to the defense and critically impeded Mr. Schell's ability to respond to the charges before the jury.

C.

Moreover, while Mr. Schell wished to testify on his own behalf, especially because the Government did not intend to use his prior record to impeach him, the district court, *sua sponte*, stated that it believed the Government could use Schell's prior record for impeachment. These comments and holdings of the trial court substantially inhibited the exercise of Mr. Schell's right to testify. In fact, as a direct result of the Court's ruling, Mr. Schell could not and did not testify. The court would not permit counsel to establish a chain of custody without Mr. Schell's testimony but almost simultaneously held that if he did testify he was subject to being confronted with his prior record not only to impeach his credibility but also as substantive evidence of his intent.

D.

Mr. Schell was further deprived of an opportunity to present a defense to the Government's charge by the district court's refusal to admit critical expert testimony for the defense.

Mr. Schell contended that the videotapes demonstrate that he neither had the knowledge nor the ability to act as charged, i.e., to manufacture a controlled dangerous substance. To establish this Mr. Schell wished to present the testimony of two highly qualified experts whose expertise was admitted by the Government.

Both experts reviewed the videotapes and Government testimony and both concluded that the items Mr. Schell received from Agent Vigna were not sufficient to manufacture methamphetamine or P-2-P. However, the experts were precluded from testifying that Schell had

neither the knowledge or capacity to manufacture methamphetamine or P-2-P.

This testimony was crucial to Mr. Schell's case. The district court's decision to reject such evidence constitutes a final denial of any opportunity to present a defense. In light of the prior rulings admitting the videotapes, denying admission of the intact chemicals and equipment, and precluding testimony by Mr. Schell himself, this ruling left Schell without any means to respond to the Government's allegations.[4]

The testimony of these experts would have permitted Mr. Schell to rebut the Government's truncated version of the videotape evidence. The refusal to admit these expert conclusions was the last adverse ruling which ultimately quelled the possibility of a fair trial with due process. Precluded from testifying on his own behalf, precluded even from introducing relevant tangible evidence, Mr. Schell was denied finally even an opportunity to present essential testimony in support of his defense.

The cumulative effect of these evidentiary and testimonial rulings constitute a systematic denial of Mr. Schell's right to a fair trial, due process and an opportunity to present a defense, particularly in the context of a Government orchestrated pro active investigation. where the exclusive means of creating and preserving evidence is left in the hands of a single agent whose competency is highly questionable.

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4. Ironically, the intact and unused chemicals and equipment was denied admission into evidence by the Court, whereas the mishandled and incomplete videotape evidence was not. Thus, the only evidence which would have given a full view of what occurred on the incomplete version of the videotapes was never admitted.

**II. The delay in trial of the Petitioner violated the Mandate of the Speedy Trial Act of 1974 to his prejudice.**

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Mr. Schell was denied the speedy trial mandate of the Speedy Trial Act of 1974, 18 U.S.C. §3161, by the district court's *sua sponte* and unwarranted decision to require him to undergo a psychiatric examination.

The factual basis of this denial was fully set forth in the Motion for Dismissal.

(1) The Complaint was filed before Magistrate Cowen on May 5, 1981.

(2) The instant indictment was returned on May 13, 1981.

(3) The Defendant entered a plea of "not guilty" on May 21, 1981.

(4) Trial date was set for September 21, 1981.

(5) On September 14, 1981 the Court ordered the hearing on suppression of the video tapes to begin on September 17, 1981.

(6) On September 16, 1981, rather than have the suppression hearing begin, the Court, *sua sponte*, ordered the defendant committee pursuant to 18 U.S.C.A. §4244. The defendant was remanded to custody.

(7) Notwithstanding the continued willingness of the defendant to proceed with the suppression hearings and trial without counsel, the Court did not begin the hearing on September 17, 1981, as scheduled.

(8) On September 17, 1981, defendant's prior Attorney, Jerrold Kamensky, Esq., filed a notice of appearance reinstating his position as attorney for the defendant. Nonetheless, neither the trial nor the hearings began.

(9) On September 23, 1981 motions were filed to, among other things, seek an expeditious trial pursuant to 18 U.S.C.A. §3161. No trial date was set.

(10) On October 12, 1981, Dr. Charles D. Semel wrote to the Court indicating that the defendant suffered

no disabilities which would render him incompetent in any way. Still no trial date was set.

(11) Notwithstanding the defendant's continued efforts to have his trial begin as soon as possible and despite his repeated requests for the same as evidenced by his request of September 17, 1981 on the record and the motion filed on September 24, 1981, trial had not yet begun.

(12) Trial had not commenced within the 70-day trial period as required by 18 U.S.C.A. §3161.

(13) The defendant has been severely prejudiced by the delay. In particular, defendant was notified on or about October 5, 1981, that the Government had "discovered" the alleged laboratory that they asserted was used by the defendant for the manufacture of C.D.S. Similarly, the disclosure of an additional co-conspirator was not made until October 7, 1981.

It must be reiterated that the district court's doubts as to Mr. Schell's mental competency are without support in the record.[5] Nor did the court set forth any reasons for its decision.

Furthermore, this petition is specifically founded upon the court ordered exclusion for delay made pursuant to 18 USC §3161(h)(4). Examination of this order reveals no mention or reference to 18 USC §3161(h)(8)(A) as its statutory foundation, while the hearing notes are likewise devoid of the articulated findings necessary to a 18 USC §3161(h)(8)(A) delay exclusion. Therefore, any reliance upon 18 USC §3161(h)(8)(A) must fail on two grounds; 1) the court order itself was not based on that statutory section; and

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5. Indeed the defendant asserted he was not mentally incompetent either prior to, at the time of or subsequent to the court ordered mental examination. The Court ordered examination report filed with the District Court on October 12, 1981, diagnosed the defendant as a "healthy young man", finding him "to be psychiatrically sound, suffering from no psychiatric illness and competent within those tests of competency as set forth by the law."

2) the comcomitent articulated findings, on the record, necessary for a 18 USC §3161(h)(8)(A) delay exclusion are absent.

The sactions set forth in the Speedy Trial Act of 1974 are clear and unequivocal:

> "If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant." 18 USC §3162(a)(2).

This section applies to the instant case as it commenced after July 1, 1980. 18 USC §3163(c). There was no basis for ignoring its mandate.

## CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Theodore Simon, Esquire
Counsel for Petitioner

## APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 82-5146

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UNITED STATES OF AMERICA

*v.*

SCHELL, GEORGE,

*Appellant*

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Appeal from the United States District Court
for the District of New Jersey
(D.C. Crim. No. 81-00177-02)
District Judge: Honorable Herbert J. Stern

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Submitted Under Third Circuit Rule 12(6)
January 6, 1983
Before: ALDISERT, GIBBONS, and HIGGINBOTHAM,
*Circuit Judges.*

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**JUDGMENT ORDER**

After considering the contentions raised by appellant, to-wit, that: (1) the district court imposed three unreasonable and improper limitations on the presentation of the defendant's case: restrictions on the scope of defendant's expert testimony; prohibition of relevant tangible evidence; and inhibition of defendant's right to testify. Taken individually or cumulatively, defendant's right to a fair trial was violated; (2) the delay in trial of the defendant violated the mandate of the Speedy Trial Act of 1974 to the prejudice of the defendant; and (3) the district court improperly interpreted the requirements of *United States v. Starks*, 515 F.2d 112 (3d Cir. 1975), by ruling that the government has fulfilled its burden of proving the competency of the videotapes when the evidence showed that in four out of seven conversations, errors were made which demonstrates that the *Starks* criteria were not met; it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

ALDISERT

Circuit Judge

Attest:

SALLY MVROS

Sally Mrvos, Clerk

Dated: January 7, 1983

IN THE
UNITED STATES DISTRICT COURT
For the District of New Jersey

---

UNITED STATES OF AMERICA

*v.*

GEORGE SCHELL

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**JUDGMENT AND PROBATION/COMMITMENT ORDER**

(O)n this date, February 3, 1982 . . . (t)here being a verdict of guilty. Defendant has been convicted as charged of the offense of Conspiracy to Manufacture and Possess Methamphetamine and Travel Act Violations. . . . The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) years on Count I and four (4) years on Count II to run concurrently . . .

/s/ Herbert J. Stern
United States District Judge

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CLERK

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GEORGE SCHELL, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPOSITION**

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## QUESTIONS PRESENTED

1. Whether the district court abused its discretion in admitting the government's videotapes of meetings between petitioner and a Drug Enforcement Administration agent.

2. Whether the district court properly required petitioner to authenticate his proffered physical evidence.

3. Whether petitioner was denied his rights under the Speedy Trial Act.

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# In the Supreme Court of the United States

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No. 82-1584

GEORGE SCHELL, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

---

**BRIEF FOR THE UNITED STATES IN OPOSITION**

---

## OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1-A2) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on January 7, 1983. On March 7, 1983, Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including March 22, 1983, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of conspiring to manufacture Schedule II controlled substances, in violation of 21 U.S.C. 846, and of traveling in interstate commerce with the intent to promote the manufacture

and distribution of those drugs, in violation of 18 U.S.C. 1952 and 2. Petitioner was sentenced to two concurrent terms of four years' imprisonment.

1. The evidence at trial showed that from December 1980 through February 1981, Drug Enforcement Administration agent Joseph Vigna worked in an "underground" chemical store in Hillside, New Jersey, that was established by the DEA to identify individuals who were supplying or operating illegal clandestine drug laboratories. On December 3, 1980, Agent Vigna received a telephone call from co-defendant Samuel Allen, who stated that he was interested in buying ephedrine, an ingredient used in the production of methamphetamine.[1] The next day, in a videotaped meeting, petitioner, Allen, and Agent Vigna discussed the purchase of ephedrine and phenyl aniline (a drug used as a "cutting" agent for other drugs), as well as the acquisition of a chromographic slide of phenyl-2-propanone (P-2-P) to compare with the product Allen and petitioner expected to produce (Nov. 30, 1981 Tr. 18-29; II Tr. 10-29, 31-33, 41-42).

On six more occasions during the next five months, either petitioner and Allen or Allen alone met at the store with Agent Vigna, who attempted to videotape all of those meetings. On December 11, 1980, Agent Vigna and Allen discussed the manufacture of P-2-P (Nov. 30, 1981 Tr. 31, 33, 40-42). At meetings on January 9 and 23, 1981, all three men discussed the purchase of additional ephedrine, as well as glassware used in the manufacture of drugs, additional chemicals used in the manufacture of methamphetamine, and various formulas for making methamphetamine (II Tr. 47-95, 96-134). And on January 29, petitioner and Vigna discussed the purchase of sodium acetate, a chemical used in the production of P-2-P (Nov. 30, 1981 Tr. 60; II Tr. 136-151).

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[1]Allen pleaded guilty on September 21, 1981.

In February 1981, William Reich, an unindicted co-conspirator, agreed to produce methamphetamine using the chemicals and lab equipment provided by petitioner. Petitioner delivered to Reich mercuric chloride, P-2-P, methylamine, and hydrochloric acid, and three days later petitioner received a batch of methamphetamine in return. Throughout March and April, petitioner delivered additional chemicals to Reich and received his share of the methamphetamine produced. On April 22, 1981, Reich was arrested (V Tr. 35-37, 39-42, 45-50).

Agent Vigna and Allen met two more times at the chemical company on May 1 and 4, 1981. Allen was arrested during the May 4 meeting, and an arrest warrant was issued for petitioner the next day (Nov. 30, 1981 Tr. 66-67).

2. Prior to trial, petitioner moved to suppress the videotapes of all seven meetings at the chemical store on the ground that the government had not demonstrated that the tapes were authentic and trustworthy. Although the meetings of December 4, January 9, and January 29 had been recorded in their entirety, the January 23 tape ended before the meeting's conclusion. In addition, the December 11 meeting had not been taped.

At a hearing conducted by the magistrate, Agent Vigna testified that the tape of the January 23 meeting had ended before the meeting's conclusion because the machine had run out of tape (Nov. 16, 1981 Tr. 27-28). Agent Vigna stated that he had attempted to record the December 11 meeting but apparently had failed to activate the machinery (*id.* at 24-25). He also recounted his training and experience in the use of the videotaping equipment, the installation of the equipment at the chemical company, and the custody and control of the completed recordings (*id.* at 8-10, 12-23, 15, 17-36). Based on the evidence adduced at the hearing,

the magistrate found no government bad faith or willful misconduct that would justify suppressing the tapes. The district court adopted the magistrate's findings, and the tapes of the four meetings attended by petitioner were admitted into evidence.

3. Six days prior to the scheduled trial date of September 12, 1981, petitioner dismissed his attorney. At a hearing on the attorney's motion to withdraw, the district court learned that petitioner intended neither to be represented by an attorney nor to represent himself at trial. Instead, petitioner informed the court that he intended to present no defense whatsoever (Sept. 16, 1981 Tr. 13-14). At the conclusion of the hearing, it appeared to the district court, the prosecutor, and the defense attorney that there were reasonable grounds to question petitioner's competency. The district court accordingly ordered that petitioner submit to a competency study pursuant to 18 U.S.C. 4244 (Sept. 16, 1981 Tr. 22-23).

Six days later, petitioner's former attorney filed a notice of appearance reinstating himself as petitioner's counsel and moved for reconsideration of the commitment order and an expedited trial. Following a hearing, the district court modified the terms of the previous order and directed that petitioner be held without bail at a local correction center from which he would be released to undergo psychiatric examination (Sept. 23, 1981 Tr. 8, 11, 19, 22-26). The court of appeals later stayed the portion of the order revoking petitioner's bail, and he was released. On October 12, 1981, he was examined by a psychiatrist, who determined that he was competent to stand trial.

On October 29, 1981, petitioner retained new counsel and thereafter filed a motion to dismiss the indictment on speedy trial grounds. The motion was denied (Nov. 6, 1981 Tr. 9-10), and trial commenced on November 30, 1981.

## ARGUMENT

1. Relying on *United States* v. *Starks*, 515 F.2d 112 (3d Cir. 1975), petitioner argues (Pet. 9-10) that none of the four videotapes of his meetings with the DEA agent was admissible.[2] He contends that the government's failure to record one full meeting and part of another demonstrates that the tapes as a whole were inaccurate and inauthentic. Contrary to petitioner's argument, however, the evidence adduced at the hearing on the tapes' authenticity demonstrated that the videotapes were authentic, accurate, and trustworthy.

It is well settled that incomplete or partially unintelligible tape recordings are admissible unless the missing or unintelligible portions are so substantial that they render the recordings untrustworthy as a whole. See, *e.g.*, *United States* v. *Ruppel*, 666 F.2d 261, 272 (5th Cir. 1982); *United States* v. *Nicoll*, 664 F.2d 1308, 1314 (5th Cir.), cert. denied, 457 U.S. 1118 (1982); *United States* v. *Bell*, 651 F.2d 1255, 1259 (8th Cir. 1982); *United States* v. *Slade*, 627 F.2d 293, 301-302 (D.C. Cir.), cert. denied, 449 U.S. 1034 (1980); *United States* v. *Greenfield*, 574 F.2d 305, 307 (5th Cir. 1978), cert. denied, 439 U.S. 860 (1979). In the instant case, it is clear that the district court did not abuse its discretion by concluding that the tapes as a whole were admissible despite the failure to record the December 11 meeting and part of the meeting of January 23. Agent Vigna

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[2]In *Starks*, *supra*, 515 F.2d at 121 n.11, the Third Circuit set forth seven criteria, originally adopted in *United States* v. *McKeever*, 169 F.Supp. 426, 430 (S.D.N.Y. 1958), for determining the admissibility of tape recordings: (1) whether the recording device was capable of taping the conversation offered into evidence; (2) whether the operator of the device was competent to operate the device; (3) whether the recording is authentic and correct; (4) whether changes, additions or deletions have been made in the recording; (5) whether the recording has been preserved in a manner that is shown to the court; (6) whether the speakers are identified; and (7) whether the conversation elicited was made voluntarily and in good faith and without any kind of inducement.

explained that the December 11 meeting had not been recorded for the simple reason that he did not successfully activate the machine and that the January 23 tape ended before the meeting's conclusion because the videotape machine had run out of tape and he could not insert a new cassette in the presence of petitioner and Allen (Nov. 16, 1981 Tr. 24-25, 27). In these circumstances, the district court properly adopted the magistrate's finding that the videotape evidence was accurate and trustworthy (I Tr. 5).

2. Petitioner next claims (Pet. 10-11) that the district court erred in excluding defense testimony about unused chemicals and equipment. The record demonstrates, however, that petitioner failed properly to authenticate the evidence he wished to introduce.

As part of his defense, petitioner sought to introduce the expert testimony of a chemist concerning his analysis of certain chemicals and glassware. It was petitioner's contention that all the materials he had purchased from Agent Vigna remained unused, but he was unable to establish an unbroken chain of custody (V Tr. 154-155). The district court prevented the chemist from testifying about the materials because petitioner failed to demonstrate that the chemicals analyzed by the expert were the same chemicals that petitioner had purchased from Agent Vigna. The court rejected petitioner's arguments that a defendant is not obligated to authenticate evidence in accordance with the Federal Rules of Evidence and that the question of authenticity should be left for the jury (V Tr. 152-160). Thereafter, petitioner made no effort to authenticate the physical evidence, through either his own testimony or that of other witnesses.

The district court's ruling was correct. There is no authority for the proposition that the Federal Rules of Evidence do not apply to defendants (see Rule 1), and authentication is a preliminary question for the court, not the jury (Rules

104(a) and 901). Absent an abuse of discretion, a trial judge's ruling on authentication will not be disturbed. *United States* v. *Brewer*, 630 F.2d 795, 802 (10th Cir. 1980); *United States* v. *Luna*, 585 F.2d 1, 6 (1st Cir.), cert. denied, 439 U.S. 852 (1978). In the instant case, petitioner failed to establish a proper chain of custody or otherwise to show that the materials examined by the chemist were the same ones that petitioner purchased from agent Vigna; hence, the district court did not abuse its discretion in excluding the expert's testimony regarding those items.[3]

3. Petitioner next contends (Pet. 13-15) that the period of time during which he was forced to undergo a competency examination was not properly excludable under the Speedy Trial Act, 18 U.S.C. (& Supp. V) 3161 *et seq.* Petitioner's argument is without merit. Section 3161(h)(1)(A) specifically excludes any "delay resulting from any proceeding, including any examinations, to determine the mental competency of the defendant." See also 18 U.S.C. 3161(h)(4).

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[3]Contrary to petitioner's claim, the district court did not require petitioner to take the stand in order to authenticate the materials. Rather, the court observed that if petitioner was the only witness who could authenticate the items in question, petitioner would have to decide whether to take the stand in order to do so (V. Tr. 160-161).

The cases upon which petitioner relies (Pet. 10) also do not show that his incomplete chain of custody provided adequate authentication. In *United States* v. *Johnson*, 637 F.2d 1224 (9th Cir. 1980), the evidence submitted—an ax—was readily recognizable, and therefore the testimony needed to authenticate it was very different from that required to authenticate fungible items such as chemicals. In *United States* v. *Cyphers*, 553 F.2d 1064 (7th Cir.), cert. denied, 434 U.S. 843 (1977), the items were admitted because the government had maintained a proper chain of custody. And in *United States* v. *Goichman*, 547 F.2d 778, 782-784 (3d Cir. 1976), a document was held to have been properly admitted because it was certified as part of the record of prior court proceedings involving the defendent, contained authenticating information, and was corroborated by other documents. None of those cases is at all similar to this one.

In addition, contrary to petitioner's claim, the district court acted properly in ordering the competency examination. Under 18 U.S.C. 4244,[4] the court was required to direct the accused to submit to a mental examination if the government or the court itself had reasonable grounds to believe that the defendant was insane or so mentally incompetent as to be unable to understand the proceedings against him.[5] In this case petitioner's bizarre behavior in the courtroom prompted his own attorney, the prosecutor, and the judge all to question his competency (Sept. 16, 1981 Tr. 14, 20-22). Thus, the court properly ordered an examination of petitioner's mental competency. And even if the court had erred in this regard, petitioner cites no authority for the proposition that such an error would preclude the exclusion of otherwise excludable delay.[6]

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[4]18 U.S.C. 4244 states in pertinent part:

> Whenever after arrest and prior to the imposition of sentence * * * the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused * * *. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused * * * to be examined as to his mental condition * * *.

[5]For example, petitioner stated he was dispensing with legal representation in order to commit "judicial suicide" and that despite the dismissal of his attorney he wished "to have motions filed on [his] behalf" and to require the government to "prove the answer to those motions" (Sept. 16, 1981 Tr. 14, 20-22).

[6]There is also no merit to petitioner's contention (Pet. 11) that he was effectively denied the right to testify because the district court stated that his prior criminal convictions could be admitted for impeachment under Fed. R. Evid. 609(a). The court had previously ruled that if petitioner did not testify the convictions would not be admitted to show his intent (Fed. R. Evid. 404(b)) because their probative value would be outweighed by their prejudicial effect (Fed. R. Evid.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1983

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403). But the court ruled that if petitioner took the stand, the convictions could be admitted for impeachment (see V Tr. 2-23, 166). This ruling was based upon the court's implicit finding that if petitioner testified, the convictions' probative value would outweigh their prejudicial effect. This fact-bound question does not warrant review by this Court. And assuming the correctness of the court's evidentiary ruling, it is clear the petitioner's right to testify was not abridged. "A defendant may decide not to take the witness stand because of the risk of cross-examination. But this is a choice of litigation tactics." *Jenkins* v. *Anderson*, 447 U.S. 231, 238 (1980).

Likewise, petitioner was not improperly precluded from presenting critical expert testimony, as he claims (Pet. 11-12). Petitioner proposed to introduce the testimony of a chemist who would state, based upon a viewing of the videotapes, that petitioner lacked the intent or capability to manufacture methamphetamine (V Tr. 145, 148; VI Tr. 56-63). The court properly exercised its discretion under Fed. R. Evid. 702 in ruling that the chemist lacked special expertise regarding these matters and that, in any event, these issues should be left for the jury. See *United States* v. *Bright*, 517 F.2d 584, 586 (2d Cir. 1975) (psychiatrist prohibited from testifying concerning defendant's ability to know whether checks were stolen).

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